Supreme Court, U.S.
FILED
06-829 DEC 14 2006
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

WADE T. VERGES, PETITIONER

v.

DONNA SWISSHELM VERGES

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

Henry L. Klein
Counsel of Record
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTIONS PRESENTED

1. As a matter of due process, can the petitioner be found guilty and sentenced *in absentia* in State court to three months in jail for criminal contempt for failing to pay child support in the wake of Hurricane Katrina where two weeks before the hearing on the alleged contempt was held, the petitioner had paid the respondent all past due child support as well as her attorney's fees plus three months of *future* child support?

2. Was petitioner whose child support payments were interrupted by Hurricane Katrina but who has since paid respondent all past due child support as well as three months of *future* child support denied due process of law under the fourteenth amendment to the federal constitution when the State court thereafter found him guilty of criminal contempt *in absentia* and sentenced him to three months in jail denying him in the process the opportunity to marshal and adduce evidence in his own behalf such as the absence of willfulness on his part to commit such a crime as well as the impossibility of his performance in the aftermath of Katrina?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 2

STATEMENT 4

REASONS FOR GRANTING THE PETITION 13

CONCLUSION 26

APPENDIX

Judgment of the 22nd Judicial District Court for the Parish of St. Tammany 1a

Denial of Supervisory Writs of the State of Louisiana Court of Appeal, First Circuit 3a

Denial of Supervisory Writs and/or Remedial Writs Supreme Court of the State of Louisiana 5a

TABLE OF AUTHORITIES

Page

CASES

ADDINGTON v. TEXAS, 441 U.S. 418 (1979). 18

AOUDE v. MOBIL OIL CORP., 862 F.2D 890 (1ST CIR.1988). 18

BARRY v. BARCHI, 443 U.S. 55 (1979) 14

BILLIOT v. BILLIOT, 805 So.2D 1170 (LA. 2002). 18

BOARD OF REGENTS v. ROTH, 408 U.S. 564 (1885) 14

CLEVELAND BOARD OF EDUCATION v. LOUDERMILL, 470 U.S. 532 (1885) 13, 14

GOLDBERG v. KELLY, 397 U.S. 254 ..... *passim*

HAMDI v. RUMSFELD, 542 U.S. 507 (2004). 15, 18, 19

HICKS ON BEHALF OF FEIOCK v. FEIOCK, 485 U.S. 624 (1988). 18

ICC v. LOUISVILLE & N. R. CO., 227 U.S. 88 (1913) 17, 23

ILLINOIS v. ALLEN, 397 U.S. 337 (1970) 19

IN RE MURCHISON, 349 U.S. 133 (1955). 19, 24

JOINT ANTI-FASCIST REFUGEE COMMITTEE v. MCGRATH, 341 U.S. 123 (1951) 13

LEWIS v. UNITED STATES, 146 U.S. 370 (1892) 19

LOS ANGELES v. DAVID, 538 U.S. 715 (2003) 13

MATHEWS V. ELDRIDGE, 424 U.S. 319 (1976) 14, 15

MEMPHIS LIGHT, GAS & WATER DIV. V. CRAFT, 436 U.S. 1 (1978). 15, 21

MICHAELSON V. U.S. EX REL. CHICAGO, ST. P.M & O RY. CO., 266 U.S.42(1924) 18

MORRISSEY V. BREWER, 408 U.S. 471 (1972) 13, 14, 16

MULLANE V. CENTRAL HANOVER TR. CO., 339 U.S. 306 (1950). 15, 21

OFFUTT V. UNITED STATES, 348 U.S. 11 (1954). 19

PENFIELD CO. OF CALIFORNIA V. SECURITIES AND EXCHANGE COMMN., 330 U.S. 585 (1947) 18

QUERCIA V. UNITED STATES, 289 U.S. 466 (1933) 19, 24

ROADWAY EXPRESS, INC. V. PIPER, 447 U.S. 752 (1980). 14

SHILLITANI V. UNITED STATES, 384 U.S. 364(1966) 18

SHROCK V. ALTRU NURSES REGISTRY, 810 F.2D 658 (7TH CIR. 1987) 16

STOVE AND RANGE CO., 221 U.S.418 (1911) 15

WARD V. MONROEVILLE, 409 U.S. 57 (1972) 18

WILLNER V. COMMITTEE ON CHARACTER AND FITNESS, 373 U.S. 96 (1963). 17

STATUTES

11 U.S.C. Section 632 5

28 U.S.C. Section 1257(a) 2

28 U.S.C. Sections 455(a) 24

ARTICLE 222 OF THE LOUISIANA CODE OF CIVIL PROCEDURE 2

ARTICLE 224 OF THE LOUISIANA CODE OF CIVIL PROCEDURE 3

ARTICLE 225 OF THE LOUISIANA CODE OF CIVIL PROCEDURE 3

ARTICLE 833.A OF THE LOUISIANA CODE OF CRIMINAL PROCEDURE 4

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 12

OPINIONS BELOW

The unpublished decision of the Supreme Court of the State of Louisiana in *Wade T. Verges v. Donna Swisshelm Verges*(Docket No. 2006-CC-1200), decided and filed September 15, 2006,denying the petitioner's application for a writ of supervisory review or for any other remedial writs, is set forth in the Appendix hereto(App. 5).

The unpublished decision of the Court of Appeal for the State of Louisiana, First Circuit, in *Wade T. Verges v. Donna Swisshelm Verges*(Docket No. 2006-CW-0449), decided and dated April 7, 2006, denying the petitioner's application for supervisory writs and his request for a stay, is set forth in the Appendix hereto(App. 3-4).

The unpublished Judgment of the 22nd Judicial District Court for the Parish of St. Tammany, in *Wade T. Verges v. Donna Swisshelm Verges*(Docket No. 94-11670–Division "C"), rendered on February 21, 2006, and filed February 22, 2006,denying all the petitioner's motions, granting the respondent's Motion for Contempt and ordering the petitioner jailed for three months without reduction for good behavior or for any other reason, is set forth in the Appendix hereto(App. 1-2).

JURISDICTION

The decision of the of the Supreme Court of the State of Louisiana, the State court of last resort having jurisdiction to review the decisions of all inferior State courts, denying the petitioner's application for a writ of supervisory review or for any other remedial writs and

there affirming the First Circuit Court of Appeal's denial of the petitioner's application for supervisory writs and his request for a stay, was decided and filed September 15, 2006(App. 5).

This petition for writ of certiorari is filed within ninety (90) days of the date of the decision of the highest court of the State of Louisiana in which a decision could be had, consistent with 28 U.S.C. Section 1257(a).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1257(a).

RELEVANT PROVISIONS

United States Constitution, Amendment XIV, Section 1:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....

Article 222 of the Louisiana Code of Civil Procedure:

> A direct contempt of court is one committed in the immediate view and presence of the court and of which it has personal knowledge, or a contumacious failure to comply with a subpoena or summons, proof of service of which appears of record....

Article 224 of the Louisiana Code of Civil Procedure:

> A constructive contempt of court is any contempt other than a direct one.
> Any of the following acts constitutes a constructive contempt of court:
> ....
> (2) Wilful disobedience of any lawful judgment, order, mandate, writ, or process of the court;...and
> ....
> (10) Any other act or omission punishable by law as a contempt of court, or intended to obstruct or interfere with the orderly administration of justice, or to impair the dignity of the court or respect for its authority, and which is not a direct contempt....

Article 225 of the Louisiana Code of Civil Procedure:

> A. Except as otherwise provided by law, a person charged with committing a constructive contempt of court may be found guilty thereof and punished therefor only after the trial by the judge of a rule against him to show cause why he should not be adjudged guilty of contempt and punished accordingly. The rule to show cause may issue on the court's own motion or on motion of a party to the action or proceeding and shall state the facts alleged to constitute the contempt....
>
> B. If the person charged with contempt is found guilty, the court shall render an order reciting the facts constituting the contempt, adjudging the

person charged with contempt guilty thereof, and specifying the punishment imposed.

Article 833.A of the Louisiana Code of Criminal Procedure:

A. The court may permit a defendant charged with a misdemeanor to be arraigned, plead guilty, or be tried, in his absence. Otherwise he must be present, provided that he may appear at arraignment by way of simultaneous audio-visual transmission....

STATEMENT

The petitioner Wade T. Verges (the "petitioner") is a 62-year-old successful architect and land developer who is a life-long resident of New Orleans with no criminal record. He has been married three times and his second marriage was to the respondent Donna Swisshelm Verges ("the respondent"). His marriage to the respondent produced two children. The petitioner has four other children from his other marriages and he has eight grandchildren as well.

In 1994, the petitioner and the respondent were divorced and incident to their separation, the petitioner agreed to pay the respondent a sum of money each week for child support together with payments for medical insurance, medical bills and speech therapy associated with the care of their daughter who suffers from Down Syndrome. For example, during 2003, the petitioner paid the respondent $53,577.00 in child support; in 2004, he paid her $61,488.00; and in the first eight months of 2005, he paid the respondent $40,992.00 in child support.

Since 2003, the petitioner had been in a bankruptcy reorganization, operating as a debtor-in-possession of his commercial and rental properties in New Orleans. As a debtor-in-possession, the petitioner received a $10,000 monthly salary for managing the bankrupt estate. Consistent with 11 U.S.C. Section 632, which provides that child support payments may not be collected from the debtor's estate but only from his post-bankruptcy income, the petitioner paid his child support regularly from his monthly salary of $10,000. In fact, until August 25, 2005, the petitioner's child support payments were automatically deducted from his checking account.

On August 26, 2005, however, the Bankruptcy Court appointed a trustee to manage his estate. Once a trustee was appointed, the petitioner no longer received a salary for managing the estate; the trustee, *not* the petitioner, was now responsible for making his child support payments from the estate itself with all such payments being approved by the Bankruptcy Court.

Hurricane Katrina followed immediately on the heels of this change in protocol for the payment of the petitioner's child support. The storm in late August and early September of 2005 shut down the State and federal courts, displaced most inhabitants of the City of New Orleans, disrupted any semblance of routine life and caused general havoc. In the midst of this anarchy, the petitioner's bankruptcy trustee was unavailable to make the petitioner's child support payments; State and federal courts were closed; State and federal judges as well as most lawyers had evacuated the city; there was no mail delivery or telephones; and the City of New Orleans has not yet returned to any sense of normalcy.

On November 22, 2005, however, almost three months after Hurricane Katrina and before all essential services had returned to the city, the respondent filed a Rule in the 22nd Judicial District Court for the Parish of St. Tammany to compel the petitioner to make child support payments and for contempt due to the interruption of child support payments caused by Hurricane Katrina. The petitioner responded the next week with his own motions to reduce child support payments, to establish visitation with his children and to compel the respondent to account for her use of his previous child support payments.

While this matter was pending in State court, the Bankruptcy Court for the Eastern District of Louisiana, after holding an emergency telephone conference, issued a Rule to Show Cause in early December of 2005 regarding the emergent issue of the petitioner's claimed use of $8,000 from an undisclosed account in the bankruptcy estate, property which was the exclusive property of the trustee in bankruptcy and an issue which was within the exclusive jurisdiction of the Bankruptcy Court.

Later in December, the petitioner attempted to have the bankruptcy trustee bring the child support payments up to date by asking him in writing that he do so "forthwith from the Chase account which contains unencumbered funds" of the bankruptcy estate. By December 29, 2005, the petitioner's attorney wrote the respondent's counsel for the exact amount of past due child support and requested that the respondent's attorney "send [the bankruptcy trustee] a letter as soon as possible so that he can have the authority he needs to pay child support...."

On January 2, 2006, the respondent's attorney e-mailed the bankruptcy trustee with the correct amount of the arrearage in child support payments for the trustee to pay as well as his request for attorney's fees in the amount of $3,820; and he advised in writing that he had no opposition to having the bankruptcy trustee----*not* the petitioner----make the past due child support payments. A week later, the respondent's attorney supplied the bankruptcy trustee with the necessary affidavit to support his request for attorney's fees. With the payment of all past due child support to the respondent imminent, the petitioner continued to ask the respondent to account for how she was spending the $5,124 monthly in child support payments which the petitioner was obligated to make.

With matters in this posture, the Bankruptcy Court for the Eastern District of Louisiana held a hearing on January 10, 2006, to consider the issue of the petitioner's claimed use of $8,000 from an undisclosed account in the bankruptcy estate. After examining the matter and taking evidence on the issue, the Bankruptcy Judge vacated the previously issued Rule to Show Cause and took no action to sanction the petitioner for his use of the undisclosed account, a matter which was within the exclusive jurisdiction of the Bankruptcy Court.

By January 13, 2006, the petitioner had filed in bankruptcy court an unopposed, *ex parte* motion seeking authority from the court for the bankruptcy trustee to pay the respondent the past due child support. On January 19, 2006, the Bankruptcy Court issued an order authorizing the trustee to pay the respondent both past and future child support obligations of the petitioner. One day later, on January 20, 2006, the respondent sought by

motion to have the Bankruptcy Court reconsider its earlier ruling taking no action to sanction the petitioner for his use of the undisclosed account, citing the inflammatory fact that the petitioner had spent these funds on his girlfriend. This motion by the respondent was denied.

On February 6, 2006, the bankruptcy trustee paid the respondent $32,672.00, the amount of past due child support as well as the attorney's fees for the respondent's counsel. In addition, with the petitioner's approval and to minimize the trustee's administrative burden, the trustee paid the respondent $15,372.00 for *future* child support obligations for the period from February 15, 2006, through May 15, 2006. The petitioner also requested the respondent's counsel to forward to him any bills "that are due for [his daughter's] therapy or other medical services...."

With the petitioner's payment on February 6, 2006, of $48,044.00 in child support, he has paid the respondent over $204,101.00 in child support since January 1, 2003, an amount which does *not* include his payment of medical bills and other medical expenses incident to his children's care. Since the parties' divorce, the petitioner has paid the respondent over $500,000.00 in child support.

With the matter in this posture, the case came on for hearing in the State of Louisiana's 22nd Judicial District Court for the Parish of St. Tammany, acting through Judge Patricia T. Hedges, ostensibly to consider the respondent's pending Rule to compel the petitioner to make child support payments and for contempt due to the interruption of child support payments caused by Hurricane Katrina as well as the petitioner's own motions

including one for Judge Hedges to recuse herself from presiding over these proceedings.

At this "hearing," the petitioner was not present, no evidence was taken, no witnesses testified and no documents were admitted into evidence. Instead, Judge Hedges heard only the arguments of counsel. True to his threat made prior to the hearing that he would "float the contempt issue before *this* judge and see if she lets your [expletive deleted] client get away with buying his girlfriend a mink coat..." after the Bankruptcy Court had taken no action to sanction the petitioner for his use of an undisclosed account, the respondent's attorney brought to Judge Hedges' attention this issue of the petitioner's use of this undisclosed account in his bankruptcy estate.

Despite the petitioner's payment of all past due and *even future* child support and even though Hurricane Katrina's impact had intervened to cause an understandable interruption in the petitioner's payment of child support between late August and February 5, 2006, the District Court judge after hearing about the petitioner's use of an undisclosed account in his bankruptcy estate nevertheless immediately found him in contempt and sentenced him *in absentia* to three days in jail. It did so without hearing any evidence or any witnesses or considering any exhibits. During the course of her ruling, Judge Hedges commented, "I know the [bankruptcy] trustee has charge of the money....I can't do anything about his money, but his body is something else."

More argument ensued by counsel for the respondent that the petitioner was guilty of separate, punishable contempts *for each payment* missed by reason

of Hurricane Katrina. Judge Hedges agreed and increased the jail sentence for the absent petitioner from three days *to three months*, a period of time which the court deemed "...the maximum I can do...."The petitioner was thereupon sentenced *in absentia* to St. Tammany Parish jail "for a period of three months, day for day, without reduction for good behavior or for any other reason"(App. 2). As Judge Hedges ordered, the Sheriff was "to pick him up wherever he can be found."

After this ruling and perhaps realizing there was no evidence in the record for this ruling, the respondent's counsel introduced into evidence the transcript of the hearing in the Bankruptcy Court on January 10, 2006, one which considered but then took no action to sanction the petitioner for his alleged use of the undisclosed account, a matter which was within the exclusive jurisdiction of the Bankruptcy Court in any event.

In the wake of these rulings, contained in a judgment of February 22, 2006(App. 1-2), the petitioner unsuccessfully moved in the District Court for the Parish of St. Tammany for a stay of the sentence, for reconsideration of Judge Hedges' ruling of contempt and for a new trial on the issue of whether the petitioner had committed a punishable criminal or civil contempt in the first place.

The petitioner then sought in the State of Louisiana's Court of Appeal, First Circuit, a supervisory writ together with a stay of the decision finding him in contempt(App. 3-4). The petitioner claimed in the course of his argument to the Court of Appeal that the proceedings in the District Court violated his right to due process of law under the State and federal constitutions.

Specifically, he claimed that he was tried, found guilty and sentenced for criminal contempt without notice of the charges for which he was ultimately jailed; and that this conviction was imposed in his absence and without the opportunity to marshal or adduce evidence in his own behalf. Moreover, he claimed that an unfair, biased tribunal in the District Court found him guilty of criminal contempt despite no evidence of willfulness on his part to commit such a crime.

On April 7, 2006, a majority of the three-member panel of the Court of Appeal, First Circuit, denied the petitioner's request for a supervisory writ or for a stay(App. 3-4). In a dissenting opinion, Judge Kuhn found the sentence imposed upon the petitioner to be excessive "when the totality of the circumstances are considered as it appears a suspended sentence would have insured compliance by this defendant in rule with the trial court's February 22, 2006 judgment finding him in contempt" (App. 3-4). Judge Kuhn also believed that a hearing was warranted on the petitioner's motion for Judge Hedges to recuse herself from presiding over these proceedings(App. 4).

The petitioner then applied for a writ of supervisory review from the Supreme Court for the State of Louisiana, the State court of last resort having jurisdiction to review the decisions of all inferior State courts(App. 5). During the course of this process and in his application for the writ, the petitioner claimed that the proceedings in the District Court violated his right to due process of law under the State and federal constitutions. Specifically, he claimed that he was tried, found guilty and sentenced for criminal contempt without notice of the charges for which he was ultimately jailed;

and that this conviction was imposed in his absence and without the opportunity to marshal or adduce evidence in his own behalf. Moreover, he claimed that an unfair, biased tribunal in the District Court found him guilty of criminal contempt despite no evidence of willfulness on his part to commit such a crime.

In the meantime, the petitioner, incarcerated in the Parish jail as a result of the District Court's sentence, was initially denied bail by the District Court pending his appeal. The Court of Appeal, First Circuit, affirmed this denial of bail by the same majority which affirmed the criminal contempt judgment on April 7, 2006. However, on April 18, 2006, upon the petitioner's further appeal of this denial of bail, the Supreme Court of the State of Louisiana, granted the petitioner post-conviction bail, remanding the matter to the District Court for this limited purpose. In all, the petitioner spent seventeen (17) days in jail before bail was allowed.

On September 15, 2006, the Supreme Court of the State of Louisiana denied the petitioner's application of a writ of supervisory review or for any other remedial writ(App. 5). The petitioner has now petitioned this Court for a writ of certiorari to the Supreme Court of the State of Louisiana.

REASONS FOR GRANTING THE PETITION

The State Proceedings Below Imprisoning The Petitioner For Criminal Contempt Denied Him Due Process of Law.

The Petitioners' Property Interest

The starting point is identifying the petitioner's property or liberty interest at risk in these proceedings in State court. Under the due process clause of the fourteenth amendment, the petitioner would be entitled to procedural due process if the property/liberty interest at stake is deemed to be of such magnitude or importance that its loss can fairly be characterized as important; and it depends upon the extent to which the individual will be "condemned to suffer grievous loss." *Morrissey v. Brewer*, 408 U.S. 471, 481(1972) quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123,168(1951)(Frankfurter, J., concurring). *Goldberg v. Kelly*, 397 U.S. 254, 262-263(1970).

The petitioner's possible incarceration as well as any fines which may have ensued as a result of the contempt hearing in State court constitutes a final, lasting deprivation of *property* entitling him to the protection of the Federal due process clause. *Los Angeles v. David*, 538 U.S. 715, 717(2003) (deprivation of money is the deprivation of property for purpose of evaluating due process protection). *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538;541 (1885)("The point is straightforward: the Due Process Clause provides that certain substantive rights—life, *liberty*, and property—cannot be deprived except pursuant to constitutionally adequate procedures")(emphasis

supplied).

Beyond the petitioner's liberty and property interests at risk in these State court contempt proceedings is the resulting stigmatic effect of these sanctions upon the petitioner's right to pursue a livelihood as a formerly successful architect and land developer, a property right deserving of due process protection. *Loudermill*, 470 U.S. at 538. *Barry v. Barchi*, 443 U.S. 55, 69-70(1979)(Brennan, J., concurring in part). *Board of Regents v. Roth*, 408 U.S. 564, 576-578(1972).

This analysis supports the proposition that when a litigant is faced with the possibility of being sanctioned with incarceration and/or fines for alleged contumacious behavior, the Due Process Clause mandates that such sanctions "should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766-767 (1980).

What Process Was Due The Petitioner?

Once it is determined that the Due Process Clause applies to the State court proceedings below, "the question remains what process is due." *Loudermill*, 470 U.S. at 541 quoting *Morrissey v. Brewer*, 408 U.S. at 481. This Court's decision in *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976) dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the government's asserted interest, "including the function involved" and the burdens the government would face in providing greater safeguards. *Id.* at 335. The *Mathews* calculus then contemplates a judicious

balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute procedural safeguards." *Id.* See *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-529(2004).

Employing the *Mathews* calculus to the circumstances of this case in order to balance the petitioner's legitimate private interest not to be sanctioned with jail or monetary fines unfairly or to have his livelihood threatened with unwarranted disciplinary action against the judicial system's need for efficient administration, the petitioner submits that the process due him below consists of the following elements:

A. Adequate Notice. The petitioner was entitled to notice of the hearing on possible sanctions in the 22nd Judicial District Court for the Parish of St. Tammany in February 21, 2006, which was reasonably calculated, under all the circumstances, to apprise them of the precise nature of this proceeding. *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314(1950). The notice was required to be of a kind which would reasonably and fairly convey to him the required information so that he could appear and respond effectively with his objections in whatever form was allowed. *Id. Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1,13-14(1978). It was therefore critically important that he was given notice that this proceeding before Judge Hedges was going to be criminal in nature rather than civil because both the respondent and Judge Hedges were going to focus on sanctioning the petitioner as a punishment rather than to remedy any ongoing contempt.

Gompers v. Buck's Stove and Range Co., 221 U.S.418,

446(1911).

B. A Full Evidentiary Hearing On Contested Fact Issues. The procedures to be employed should be "tailored to the capacities and circumstances of those who are to be heard." *Goldberg v. Kelly*, 397 U.S. at 268-269. There were fundamental fact questions to be determined by Judge Hedges before she could impose sanctions upon the petitioner consonant with the respondent's motion to compel the payment of child support, e.g., was the petitioner presently in violation of any outstanding order or decree or was the petitioner presently in compliance with all prior orders and decrees? Was the petitioner's conduct in the wake of Katrina in reestablishing child support----including the payment of all past due child support, the respondent's attorney's fees, and even three months of future child support---- conclusive evidence undercutting any finding of willfulness on his part to disobey the earlier court orders or decrees regarding child support? Was the interruption of child support by Katrina coupled with the appointment of a trustee for the petitioner's bankruptcy estate which changed the protocol in paying child support persuasive reasons to find no evidence of willfulness by the petitioner?

A hearing addressing these crucial, contested fact questions was required as a matter of due process. *Shrock v. Altru Nurses Registry*, 810 F.2d 658, 661-662(7th Cir. 1987). Moreover, considering the level of deprivation of the petitioner's personal liberty which would (and did) flow from Judge Hedges' decision on sanctions and the low tolerance for the risk of a mistaken decision, see *Morrissey v. Brewer*, 408 U.S. at 485-489, these fact questions could not be resolved by just oral argument by

counsel or by requiring that the parties submit their respective positions only "on the papers." Instead, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. at 269-270 citing *ICC v. Louisville & N. R. Co.*, 227 U.S. 88,93-94(1913) and *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 103-104(1963). See *Arnett v. Kennedy*, 416 U.S. at 142-146.

The right to cross-examine and confront adverse witnesses and their evidence implies the right to marshal and adduce one's own evidence in support of a position on a contested fact issue such as whether the petitioner was presently in violation of any outstanding order; whether his conduct in the wake of Katrina seeking the aid of the Bankruptcy Court—and the respondent's own counsel---to reestablish child support supported the inference of good faith and the absence of willfulness on his part; and whether Katrina's impact together with the coincident change in protocol for paying child support caused by the appointment of a bankruptcy trustee were circumstances excusing entirely the interruption in child support.

Especially where the contested facts were subject to different interpretations by the parties and where the resulting decision would result in a dramatic loss of liberty by incarceration, the petitioner was entitled to a full evidentiary hearing so that Judge Hedges would have a fair and complete record upon which to make her findings on each crucial fact issue while at the same time giving an appellate court a sufficient record upon which to review the hearing judge's fact finding. See *Goldberg v. Kelly, supra.* Any doubt by the hearing judge on this score should be resolved *in favor* of taking evidence. See

Aoude v. Mobil Oil Corp., 862 F.2d 890,894(1st Cir.1988).

If this contempt hearing were purely remedial or coercive and therefore civil in nature, the parties' respective burdens of proof would be a preponderance of the evidence. *Addington v. Texas*, 441 U.S. 418, 423(1979). See also *Hamdi v. Rumsfeld*, 542 U.S. at 534. However, where the proceedings before Judge Hedges unmistakably became a hearing on the degree of unconditional punishment or jail time she should impose on the petitioner *rather than* to remedy any ongoing contempt (because there was no ongoing contempt), they became criminal in nature and each element of the criminal contempt required proof beyond a reasonable doubt. *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 632 n.5(1988). *Michaelson v. U.S. ex rel. Chicago, St. P.M & O Ry. Co.*, 266 U.S.42(1924). See *Shillitani v. United States*, 384 U.S. 364, 370(1966); *Penfield Co. of California v. Securities and Exchange Commn.*, 330 U.S. 585, 590(1947); *Billiot v. Billiot*, 805 So.2d 1170, 1173-1174(La. 2002).

Finally, in order to implement each of these due process rights, the petitioner must actually be present in the courtroom. Lacking adequate notice that these were criminal contempt proceedings, indeed the petitioner was *never* apprised that the hearing on February 21, 2006, would take the unanticipated turn from a now hollow claim by the respondent of civil contempt by the petitioner to one of criminal contempt punishable by jail, the petitioner was not present. Accordingly, he could not exercise his due process rights. This Court has made clear that a criminal defendant cannot be tried consistent with due process *in absentia*. *Hamdi v. Rumsfeld*, 542 U.S. at 533 quoting *Ward v. Monroeville*, 409 U.S. 57, 61-62(1972).

Illinois v. Allen, 397 U.S. 337, 338(1970). *Lewis v. United States*, 146 U.S. 370, 372(1892).

C. **A Fair And Impartial Tribunal.** Due process also requires a neutral and detached judge in the first instance. *Hamdi v. Rumsfeld, supra. Withrow v. Larkin*, 421 U.S. 35, 46-47(1975). *Arnett v. Kennedy*, 416 U.S. at 197. *Goldberg v. Kelly*, 397 U.S. at 271. *In re Murchison*, 349 U.S. 133, 136(1955). While Judge Hedges was more than a mere umpire----in fact, she was the governor of the proceedings before her—she cannot consistent with due process become an advocate or otherwise use her judicial powers to advantage or disadvantage a party unfairly. *Quercia v. United States*, 289 U.S. 466, 470(1933). Nor "should [she] give vent to personal spleen or respond to a personal grievance." *Offutt v. United States*, 348 U.S. 11, 14(1954).

The Petitioner Was Denied The Process Due Him By The Fourteenth Amendment.

The Notice Of The Truncated Sanction Proceeding Was Inadequate.

Before any State court hearing was even held on February 21, 2006, in the 22nd Judicial District Court for the Parish of St. Tammany on the respondent's request to compel the petitioner's payment of child support, the petitioner had *already* complied with his duty to pay the respondent child support—i.e., on February 6, 2006, he had *already* paid the respondent not only $32,672.00 for the past child support interrupted by Katrina's devastation, including the respondent's attorney's fees, but also another $15,372.00 for *future* child support obligations for the period from February 15, 2006,

through May 15, 2006. Accordingly, even if the petitioner's failure to make child support payments immediately in the wake of Katrina's devastation could somehow be characterized as contumacious----which he denies----it was only a civil contempt which was purged entirely by his payment on February 5, 2006, of past due child support including the respondent's attorney's fees as well as his payment to the respondent on the same day of *three months future child support.*

Having complied completely with his duty to provide the respondent child support, even paying the respondent child support in advance for three months as well as her attorney's fees, the petitioner in the absence of notice otherwise had the right to assume that the proceeding scheduled for February 21, 2006, before Judge Hedges would consider at most only the now purged civil contempt caused by the interruption of child support after Katrina, *not* any criminal contempt unidentified in the respondent's moving papers. Yet the respondent was allowed by Judge Hedges to inject into this hearing *without notice* new claims about the Bankruptcy Court's earlier refusal to sanction the petitioner for his use of an undisclosed account in the bankruptcy estate on his girlfriend, a matter within the exclusive jurisdiction of the Bankruptcy Court in any event.

Judge Hedges, having a long and sour history with the petitioner and having already announced her own objection to the rulings which other judges have made in this matter, predictably responded to the respondent's inflammatory charges. Despite the petitioner's payment of all past due and *even future* child support as well as the respondent's attorney's fees and even though Katrina together with the new protocol in bankruptcy for paying

child support had intervened to cause an understandable interruption of child support, she nevertheless immediately found petitioier in contempt and sentenced him *in absentia* to three days in jail. She did so without hearing any evidence or any witnesses or considering any exhibits. This sentence was increased to "a period of three months, day for day, without reduction for good behavior or for any other reason"(App. 2), the maximum Judge Hedges thought she could impose, after respondent's counsel suggested to her that she could consider each missed weekly payment by the petitioner a separate event for purposes of punishment.

All of this was at variance with the notice given the petitioner of these proceedings, a notice which was *not* reasonably calculated to apprise him of, and permit adequate preparation for, this truncated hearing on sanctions for criminal contempt, as required by this Court's decision in *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. at 14-15 and *Mullane v. Central Hanover Trust Co.*, 339 U.S. at 314. This new, unanticipated consideration of the petitioner's criminal contempt---- *never* foretold by the respondent's moving papers---- unfairly "sandbagged" the petitioner, denied him and his attorney of the opportunity to be heard and violated his due process rights.

"[W]hen notice is a person's due, process which is a mere gesture is not due process." *Mullane*, 339 U.S. at 315. The notice here was *less* than a mere gesture; it was incomplete, misleading and deprived the petitioner of a fair hearing.

There Was No Full And Fair Hearing On The Petitioner's Objections To The Sanctions.

If the petitioner had been given constitutionally adequate notice of the nature of the proceedings on February 21, 2006, he would have adduced positive proof that on account of his prior actions in assuring that the respondent was paid all past child support, her attorney's fees and three months of future child support, he was not then acting in violation of any clear, outstanding order so as to justify civil contempt as required by Louisiana law. He would also have proffered evidence that he was then and there in complete compliance with all existing orders and decrees, that he lacked any willfulness to disobey the prior orders and decrees and therefore could not be found in civil contempt, much less criminal contempt, and that given the coincidence of Katrina along with a changed protocol for paying child support associated with the appointment of a bankruptcy trustee in the petitioner's bankruptcy proceeding, his conduct in their aftermath demonstrated a good faith attempt to reestablish child support, not to avoid its payment.

These were fundamental fact questions to be determined by Judge Hedges before she could impose *any* sanction, much less jail time, upon the petitioner. According to the judge through her actions on the Bench, however, this exculpatory proof had no bearing at all on the issue of whether the respondent was entitled to sanctions. All that was important was that the petitioner be tarred with some objectionable behavior, even if the Bankruptcy Court had already determined that this conduct ----unrelated to this action and within the Bankruptcy Court's exclusive jurisdiction---deserved no sanctions. Moreover, she allowed the respondent's counsel

to argue in favor of increasing the sanctions based upon missed child support payments, *ones which had already been made up by the petitioner.*

This one-sided treatment of the parties by Judge Hedges at the truncated sanction hearing to the detriment of the petitioner and her refusal to allow the petitioner to adduce any proof violated his due process right to a full and fair evidentiary hearing on his objections and proof, as guaranteed him by the constitution and the decisions of this Court. See *Goldberg v. Kelly*, 397 U.S. at 269-270 citing *ICC v. Louisville & N. R. Co.*, 227 U.S. at 93-94 and *Willner v. Committee on Character and Fitness*, 373 U.S. at103-104. See also *Arnett v. Kennedy*, 416 U.S. at 142-146.

The due process deprivation is made more clear by Judge Hedges' immediate decision to impose upon the petitioner unconditional punishment or jail time, a deliberate resolve which rendered the proceedings criminal in nature. Her subsequent refusal to appoint a private prosecutor to bring charges against the petitioner, to insist that each element of the criminal contempt be proved beyond a reasonable doubt and to require the petitioner be present for trial, all denied the petitioner the due process of the laws guaranteed him by the fourteenth amendment.

Judge Hedges Was Neither Fair Nor Impartial.

Because of her prior involvement with this case and its parties, Judge Hedges on February 21, 2006, was already beset with an intense dislike of the petitioner; at other times, she has objected to the rulings other judges have made in this matter, announcing on the record her

own disabling predisposition and bias against the petitioner. Despite this want of fairness or partiality, the judge refused to recuse herself and then proceeded to punish the petitioner with three months in jail for an unidentified contempt(s) even though the petitioner has paid all past due and *even future* child support as well as the respondent's attorney's fees and even though Katrina together with the new protocol in bankruptcy for paying the petitioner's child support had intervened to cause an understandable interruption of child support.. She did so without hearing any evidence, hearing any witnesses or considering any exhibits.

The unmonitored act of assessing sanctions against a party already evoking the displeasure of the sentencing court can easily beget emotion. A court can lose sight of its otherwise dispassionate review of the facts and the law when it considers this kind of punishment. Moreover, where the motion judge has attained knowledge of a party through prior communication with fellow judges of the same court or through its own involvement in the case, she must be scrupulous both to avoid losing her partiality and to maintain her unfamiliarity with disputed matters which may come before her. *In re Murchison*, 349 U.S. at 138. See *Quercia*, 289 U.S. at 470. Thus a judge should disqualify herself in a proceeding in which her partiality might reasonably be questioned, including but not limited to instances where she has a personal bias or prejudice concerning a party. See, e.g., 28 U.S.C. Sections 455(a) and (b)(1).

Judge Hedges' unbending disapproval of the petitioner has irredeemably tainted her treatment of him in the proceedings below; predisposed her to deny him a fair hearing on the respondent's motion to compel and

rendered her incapable of believing that he was not in contempt of any outstanding orders or decrees concerning child support despite the unquestioned facts to the contrary.

In these circumstances, she lost her ability to consider this matter fairly or impartially and her recusal from this case was warranted. On this record, Judge Hedges was bound to disqualify herself because her partiality against the petitioner might reasonably be questioned. Her refusal to do so denied the petitioner due process of law.

For all of these reasons, the proceedings below punishing the petitioner violated the due process guaranteed him by the fourteenth amendment to the federal constitution.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the Supreme Court of the State of Louisiana and, ultimately, to vacate the judgment and remand the matter to the 22nd Judicial District Court for the Parish of St. Tammany, for a new judgment which finds the petitioner not guilty of civil or criminal contempt, expunges from the record the jail sentence imposed upon him as a result of this wrongful, unconstitutional conviction or provides the petitioner with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,
Henry L. Klein
844 Baronne Street
New Orleans, LA 70113-1103
(504)586-9971
Counsel of Record

Filed: 2/22/06

22nd JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. TAMMANY

STATE OF LOUISIANA
NO. 94-11670
DIVISION "C"

WADE T. VERGES

VERSUS

DONNA SWISSHELM VERGES

JUDGMENT

This matter came for hearing on the 21st day of February, 2006, on various motions filed by *the parties.*

PRESENT: Henry L. Klein for Wade T. Verges, Clint L. Pierson, Jr. for Donna S. Verges, and John M. Dubreuil for Donna S. Verges

For reasons orally assigned, the court rules as follows: Courts.

1. On Wade Verges' Motion to Consider Altering the Court's Reasons for Judgment Due to the Impact of a *Force Majeure,* that motion is DENIED.

2. On Wade Verges' Motion to Reduce Child Support, that motion is DEFERRED by stipulation of the parties pending a report to be provided to the court by Greg Verges, who is hereby appointed to conduct an

investigation on the ability of Wade Verges to pay child support and on the needs of Donna Verges for child support regarding Courtney Verges.

3. On Wade Verges' Motion to Establish Visitation Rights, that motion is DEFERRED by stipulation of the parties pending a report to be provided to the court by Dr. Alicia Pellegrin, who is hereby appointed to conduct an investigation on the best ways and means by which visitation between Wade Verges and Courtney Verges can be achieved.

4. On Wade Verge' Motion to Compel Donna Verges to Account for Child Support Payments, that motion is DEFERRED pending a report from Greg Verges.

5. On Wade Verges' Motion to Compel Discovery, that Motion is DEFERRED pending a report from Greg Verges.

5. On Donna Verges' Motion for Contempt, that motion is GRANTED and the court orders that Wade T. Verges be imprisoned in St. Tammany Parish jail for a period of three months, day for day, without reduction for good behavior or for any other reason.

6. On Wade Verges' oral motion for stay of the sentence, that motion is DENIED.

JUDGMENT RENDERED February 21, 2006.
JUDGMENT READ AND SIGNED on the 22nd day of February 2006, at Covington, Louisiana.

Judge Patricia T. Hedges

STATE OF LOUISIANA
COURT OF APPEAL, FIRST CIRCUIT
NO. 2006 CW 0449
APRIL 07, 2006

WADE T. VERGES

VERSUS

DONNA SWISSHELM VERGES

In Re: Wade T. Verges, applying for supervisory writs, 22nd Judicial District Court, Parish of St. Tammany, No. 94-11670.

BEFORE: KUHN, GUIDRY AND PETTIGREW, JJ.

STAY DENIED. WRIT DENIED, We find no error in the trial court' rulings granting Donna Verges' rule for contempt and denying Wade T. Verges' Motion to Recuse. Additionally, we feel constrained to call Rule 2-12.4 of the Uniform Rules of Louisiana Courts of Appeal to the attention of the attorneys representing Wade T. Verges in this matter.

JMG
JTP

Kuhn, J., concurs in part and dissents in part. I agree with the majority' decision to deny the stay request, deny both motions and affirm the trial court's finding of contempt. However, I dissent insofar as I find the sentence excessive when the totality of the circumstances are considered as it appears a suspended sentence would have insured compliance by this

defendant in rule with the trial court's February 22, 2006 judgment finding him in contempt. I further believe a hearing is warranted on the recusal motion.

COURT OF APPEAL, FIRST CIRCUIT
DEPUTY CLERK OF COURT FOR THE COURT

The Supreme Court of the State of Louisiana

NO. 2006-CC-1200

WADE T. VERGES

VS.

DONNA SWISSHELM VERGES

IN RE: Verges, Wade T. ; - Plaintiff; Applying for Supervisory and/or Remedial Writs, Parish of St. Tammany, 22nd Judicial District Court Div. C, Nos. 94-11670; to the Court of Appeal, First Circuit, No. 2006 W 0449

September 15, 2006

Denied.

JLW
CDK
BJJ
JPV
CDT
JTK